Petition

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NO. 81-968

In the Supreme Court of the United States

October Term, 1981

WITCO CHEMICAL CORPORATION, DR. A. J. BUSELLI, GERALD KATZ, DR. C. ROBERT LINDEGREN, and JOHN SIMS

Petitioners

VERSUS

ROGER C. COTTEN, BUTYLENE RESEARCH, INC., EXXO PLASTICS, INC., HOT LINE FITTINGS, INC., MOBILE SYSTEMS & ASSOCIATES, INC., MOBILE SYSTEMS WESTERN, INC., PLASTIC COUPLER RESEARCH CORP., POLY-CHEM FITTINGS, INC., SOUTHERN CHEMICAL, INC., and MID-SOUTH PACKAGING, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the complexity of this case justifies the district court striking plaintiffs' timely jury demand on the grounds of

   a. The historical exception to a civil litigant's Seventh Amendment rights arising in complex accountings that are equitable in nature; or

   b. A litigant's Fifth Amendment due process rights to a rational verdict overriding another litigant's Seventh Amendment rights to jury trial?

II. Did the United States Court of Appeals for the Fifth Circuit err by failing to consider whether the complex accountings involved in the instant litigation render it equitable, as opposed to legal, in nature?

III. Did the United States Court of Appeals for the Fifth Circuit err by holding that the district court's finding that it would be "most difficult, if not impossible, for a jury to reach a rational decision" does not fulfill the requirements of a complexity exception to civil litigants' Seventh Amendment rights to trial by jury?

IV. **Did the United States Court of Appeals err by not retaining jurisdiction over the appeal while remanding the matter to the district court for clarification of the standard which it applied in determining the complexity of the instant litigation?**

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO SUPREME COURT RULE 28.1

1. Witco Chemical Corporation, defendant-petitioner, its less than wholly-owned active subsidiaries and affiliates:

   a) The Baxenden Chemical Co. Limited (United Kingdom)
   b) Enenco Incorporated (New York)
   c) National Transit (Pennsylvania)
   d) Witco Chemical Limited (Israel)
   e) Pasa Petroquimica Argentina Sociedad Amonima Industrial Commercial In mobiliaria Financiera y de Mandatos (Argentina)

2. Dr. A. J. Buselli, defendant-petitioner

3. Gerald Katz, defendant-petitioner

4. Dr. C. Robert Lindegren, defendant-petitioner

5. John Sims, defendant-petitioner

6. Roger C. Cotten, plaintiff-respondent

7. Butylene Research, Inc., plaintiff-respondent

8. Exxo Plastics, Inc., now called Canal Plastics, Inc., plaintiff-respondent

9. Hot Line Fittings, Inc., plaintiff-respondent

10. Mobile Systems & Associates, Inc., plaintiff-respondent

11. Mobile Systems Western, Inc., plaintiff-respondent

12. Plastic Coupler Research Corp., plaintiff-respondent

13. Poly-Chem Fittings, Inc., plaintiff-respondent

14. Southern Chemical, Inc., plaintiff-respondent

15. Mid-South Packaging, Inc., intervenor-respondent

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The defendant-appellees below, Witco Chemical Corporation, Dr. A. J. Buselli, Gerald Katz, Dr. C.

Robert Lindegren, John Sims, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The statement of the District Court for granting defendants' motion to strike plaintiffs, timely jury demand, submitted on October 7 1980, pursuant to the Fifth Circuit's order of September 11, 1980, is unpublished and is attached to this petition as Appendix A. The opinion of the United States Court of Appeals for the Fifth Circuit, attached as Appendix B, is reported at 651 F.2d 274 (5th Cir. 1981). The Fifth Circuit's denial of the petition for panel rehearing is attached as Appendix C.

JURISDICTION

The Fifth Circuit rendered judgment on July 17, 1981. Petitioners timely filed petition for panel rehearing which the Fifth Circuit denied on September 15, 1981. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

U. S. CONST. amend. V:

> No person shall . . . be deprived of . . . property, without due process of law . . .

U. S. CONST. amend. VII:

> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved. . . .

STATEMENT OF THE CASE

Background of These Proceedings and Disposition Below

On December 21, 1976, nine plaintiffs filed this action in the United States District Court for the Eastern District of Louisiana. Subsequently, Mid-South Packaging, Inc. intervened as a plaintiff. On June 24, 1980, defendants filed a motion to strike plaintiffs' jury demand. The Court heard this motion and took it under submission on July 9, 1980, granting it on July 23 , 1980. Plaintiffs sought and obtained an order pursuant to 28 U.S.C. §1292(b) certifying the District Court's order for interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. Thereafter, plaintiffs petitioned that court and received an order permitting the interlocutory and expedited appeal. The Fifth Circuit, by order of

September 11, 1980, invited the District Court to file a statement of its reasons for granting the motion to strike plaintiffs' timely jury demand, which the District Court submitted on October 7, 1980 (Appendix A). After oral argument on February 11, 1981, the Fifth Circuit rendered its opinion reversing the District Court's decision and rendering judgment reinstating plaintiffs' jury demand on July 17, 1981. *Cotten v. Witco Chemical Corp.*, 651 F.2d 274 (5th Cir. 1981) (Appendix B). The Fifth Circuit denied defendants' petition for panel rehearing on September 15, 1981 (Appendix C).

The Complaint

The complaint, as amended, originally set forth fourteen causes of action. Voluntary dismissals and summary judgments have removed four and part of a fifth cause of action. Defendants have pending two motions for partial summary judgment and contemplate urging motions for summary judgment going to other causes of action. In addition, the parties are negotiating voluntary dismissal of all but the first, twelfth and fourteenth causes of action, which allege, respectively: shipment of defective products; monopolization and attempted monopolization of the world wide market for polybutylene and polybutylene products in violation of Section 2 of the Sherman Act;

and conspiracy or combination in restraint of trade and to monopolize the markets for polybutylene and polybutylene products in violation of Sections 1 and 2 of the Sherman Act. Despite the dismissals already obtained or contemplated, plaintiffs intend to assert all of the allegations underlying the dismissed causes of action in support of the remaining three. Consequently, while some of the legal complexity may no longer exist, all of the complex and convoluted facts remain.

STATEMENT OF THE FACTS

The Witco Corporation Polymer Division (Witco) manufactured a variety of polybutylene resins under patent licenses from 1973 to 1977. The individual defendants were Witco officers or employees during that time.

Plaintiffs and intervenor are nine corporations —— eight of whom bear parent-subsidiary or sister corporation relationships to each other —— and one individual who had direct or indirect interests in these eight corporations. Although separate entities, plaintiffs claim that they constituted a single integrated economic unit. Some of them claim to have manufactured products from polybutylene resins —— principally pipe, pipe-fittings and film —— and other pro-

ducts for use with polybutylene products. Others claim to have acted as the manufacturer's sales arms. Still others claim to have engaged in research and development of processes improving polybutylene resins and processes to manufacture products from polybutylene. In actuality, few of the plaintiffs were commercial entities and few, if any, of their processes ever attained commercial viability. To achieve some of their goals, some plaintiffs allegedly entered into relationships with other entities not party to this suit for the sale, development or manufacture of polybutylene or polybutylene compatible products. Some of these other entities and one plaintiff purchased polybutylene resins from Witco.

Polybutylene is a relatively new plastic possessing physicial properties that often make it difficult to manufacture and process into end-products both from technical and economic standpoints. Although Witco and others labored to solve these problems, polybutylene did not and has yet to achieve widespread commercial acceptance and success. As a result, Witco's polybutylene business sustained large financial losses during each year of its operation and, on November 30, 1977, Witco sold its polybutylene business to Shell Chemical Corporation.

During the period of Witco's polybutylene

business, plaintiffs claimed development of "better mousetraps" by way of new manufacturing processes, polybutylene resin compositions, and polybutylene product designs and applications. These "better mousetraps" never achieved even limited commercial success. Plaintiffs, although lacking technical and practical expertise in the industry, blame their failures on defendants' alleged anticompetitive conduct. Plaintiffs also ascribe their lack of success to defendants' breaches of fiduciary duty consisting of fraudulent misrepresentation of physical properties and pricing of polybutylene, theft or misappropriation of trade secrets, interference with contractual relations, andother business torts. The cause of plaintiffs' and intervenor's lack of commercial success, however, was their inexperience, undercapitalization, misuse or abuse of product, market conditions, and lack of technical and commercial feasibility of their new processes.

Not only will trial of this lawsuit require evidence going to significant and factually complex antitrust issues such as preparedness to enter, target area, market definition and power, causation, and damages, but also a host of highly technical engineering and chemistry issues. Crucial to all claims and defenses is technical and scientific evidence dealing with raw polymer manufacturing, polymer product

processing, polymer physics and chemistry, mircobiology, patentability, plumbing and film applications as well as evidence relating to marketing, economics, finance and valuation.[1] Finally, the complex financial tangle between 1) each plaintiff and intervenor; 2) each plaintiff and each defendant; and 3) each plaintiff, intervenor and other entities not party to this suit requires evidence similar, if not identical, to that required in a complex accounting.

REASONS FOR GRANTING WRIT

a. The Fifth Circuit did not follow this Court's decision in *Kirby v. Lakeshore & M.S.R. Co.*

The District Court held that ". . . it would be most difficult, if not impossible, for a jury to reach a rational decision." Reasons of October 7, 1980, for

1. Defendants list 12 experts in the fields of: accounting; corporate finance; plastics marketing, business operations and technology; mobile home and recreational vehicle manufacturing and marketing; economics; securities markets; polymer chemistry; polymer processing; polymer manufacturing; microbiology; polymer testing and standards; domestic and foreign codes, regulations and standards applicable to plastics in general and plastic pipe in particular; and patents. Plaintiffs list approximately 12 experts in fields similar to defendants' experts. Defendants list 112 witnesses. Plaintiffs and intervenor list approximately 85 witnesses. Defendants, plaintiffs and intervenor have now marshalled over 4,000 exhibits.

granting defendants' motion to strike the jury (appendix A). On appeal, the Fifth Circuit reversed, expressing no opinion on whether a complexity exception to the Seventh Amendment right to a jury trial exists, but ruling only that the district court had employed the wrong standard. 651 F.2d at 276 (Appendix B). Clearly, a complexity exception to a civil litigant's Seventh Amendment rights to jury trial does exist. *In Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3rd Cir. 1980); *contra*, *In Re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom., Gant v. Union Bank*, 446 U.S. 929; (1980) (holding Seventh Amendment rights absolute; no complexity exception exists).[2] Additionally, another reason which the Fifth Circuit did not consider supports the district court's decision: the instant case involves complex accountings properly cognizable in equity, not law.

Although the district court did not expressly base its decision on this reason, the district court did articulate all of the supporting factors in its written

2. While the issue of whether a complexity exception to civil litigants' Seventh Amendment rights is only peripherally before the Court, if this Court should rule in petitioners' favor on either of the first two reasons for granting the writ, it will have to face this issue. The issue of whether a complexity exception exists is most appropriate for decision in view of the conflict between the decisions of the Third and Ninth Circuits. *See Rule 17.1(a), Rules of the Supreme Court of the United States.*

reasons of October 7, 1980.[3] The district court found that the case involved - and a trier of fact would have to determine - *inter alia*, "complicated financial accountings". While an action brought under the antitrust laws might not ordinarily involve or require an accounting, *see In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d at 1080-81, the instant action is not purely an antitrust suit and, even as to its antitrust aspects, partakes of an accounting. Unlike the parties in *In Re Japanese Electronic Products Antitrust Litigation*, some of the plaintiffs entered into contracts with the corporate defendant and these parties bear a special relationship to each other: that of vendor and purchaser. *See id.* at 1080. The facts pleaded under plaintiffs' separate causes of action urge fraud, misappropraitaion of trade secrets, and various breaches of fiduciary duty. Both the products liability and antitrust claims themselves involve complex accountings because a major portion of the antitrust damages devote themselves to placing a dollar value upon the deprivation of certain opportunities allegedly belonging to plaintiffs which the corporate defendant allegedly appropriated to itself.

3. This Court has the power to reverse the Fifth Circuit and affirm the district court on grounds not expressly relied upon by the district court or, at least, remand the matter to the Fifth Circuit for consideration of those grounds. *See Liberty Glass Co., Inc. v. Allstate Insurance Co.*, 607 F.2d 135, 138 (5th Cir. 1979); *O'Brien v. Contintental Illinois National Bank & Trust Co. of Chicago*, 593 F.2d 54, 65 (7th Cir. 1979).

Further, the complex relationship between the plaintiff corporations *inter se*, defendant corporation, and the plaintiffs' alleged coventurers, as well as the other companies who performed tolling services of plaintiffs, involve a massive tangle of transactions which require an accounting. Thus, not only do the relationships necessary for an accounting (fiduciary and contractual) exist, but plaintiffs allege a number of facts which call for an accounting. *See Id.* at 1080.

While a suit for a accounting is ordinarily an action at law over which equity jurisdiction will not lie, an exception to this rule exists where a party shows "that the 'accounts between the parties' are of such a 'complicated nature' tht only a court of equity can satisfactorily unravel them" thus justifying equity jurisdiction over the accounting. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (*citing Kirby v. Lakeshore & M.S.R. Co.*, 120 U.S. 130, 134 (1887)); *accord, H.B. Zachry Co. v. Terry*, 195 F.2d 185, 189 (5th Cir.), *cert denied.*, 344 U.S. 819 (1952); *Quality Realty Co. v. Wabash Ry. Co.*, 50 F.2d 1051, 1055 (8th Cir. 1931); *Goffe & Clarkener, Inc. v. Lyons Milling Co.*, 26 F.2d 801, 804 (D.Kan. 1928), *aff'd*, 46 F.2d 241 (10th Cir.1931). Indeed, in *Kirby v. Lakeshore & M.S.R. Co.*, this Court, overturning a circuit court's judgment for defendant on demurrer to a suit for an accounting filed in equity, ruled:

> The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accoun;ts between the parties constitutes itself sufficient ground for going into equity. *It would have been difficult if not impossible,* for a jury to unravel the numerous transactions involved in the settlement between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement [citation omitted]. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted. 130 U.S. at 134 [emphasis added].

The district court's reasons for granting defendants' motion to strike plaintiffs' jury demand clearly recognized the existance of "complicated financial accountings" and alluded to plaintiffs' charge of fraud and breach of fiduciary duty (comprehended in the plaintiffs' claim for misappropriation of trade secrets which even if dismissed as a separate cause of action remains part of plaintiffs' Sherman Act claims). Further, in striking the jury, the court orally stated: "there is no way that a jury can decide which particular allegation against which defendant." *Transcript of Proceedings of July 23, 1980, at 27-28.* The district court, therefore, found the facts necessary to invoke the complex accounting exception

to legal jurisdiction justifying its order striking plaintiffs' timely jury demand. Further, the language the district court used — "it would be most difficult, if not impossible, for a jury to reach a rational decision" — is precisely that language used by this Court in *Kirby*.

Despite petitioners' invocation of this complex accounting exception, the Fifth Circuit ignored its applicability to civil litigants' Seventh Amendment rights to jury trial. The Fifth Circuit's refusal to consider this issue places its decision in conflict with applicable decisions of this Court. *Rule* 17.1(c), *Rules of the United States Supreme Court.*

Accordingly, petitioners pray this Court to grant certiorari and summarily reverse the Fifth Circuit or, alternatively, to remand to the Fifth Circuit for consideration of the question.

B. The District Court's finding that the instant case is so complex as to be "most difficult, if not impossible" for a jury to decide rationally meets applicable standards for striking a timely jury demand on the grounds of complexity.

In its opinion of July 17, 1981, the Fifth Circuit held that the district court's finding that it would be "most difficult, if not impossible, for a jury to reach a rational decision" did not conform to the standard

which the Third Circuit articulated in *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d at 1088. According to that case:

> The complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules. *Id.*

The Fifth Circuit grounded its conclusion that the district court failed to meet the Third Circuit standard by quoting the Third Circuit's comments that: "it is not enough that the trial to the court would be preferable". *Cotten v. Witco Chemical Corp.*, 651 F.2d at 276 (*citing In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d at 1088). The Fifth Circuit erred in two respects: the district court's finding in the instant case actually complied with the Third Circuit's standard and prior jurisprudence striking timely jury demands for complexity has not required so rigorous a standard as that imposed by the Fifth Circuit.

The "most difficult, if not impossible" standard utilized by the district court is considerably more rigorous than a standard based on trial to the court being preferable to trial to a jury. Indeed, there is little, if any, difference between the district court's for-

mulation of the standard and the Third Circuit's standard. The district court by joining the clause: "if not impossible" to the words: "most difficult", invoked the Third Circuit standard. The district court found that it would be just short of impossible for a jury to arrive at a rational decision in the instant litigation. Clearly, the district court, by citing *In Re Japanese Electronic Products Antitrust Litigation* in its reasons of October 7, 1980, for granting defendants' motion to strike plaintifffs' timely jury demand, intended to meet the Third Circuit's standard.

The Third Circuit's standard does not require the absolute certainity imposed by the Fifth Circuit. Rather, the Third Circuit spoke to a jury's "likely" unfamiliarity with technical concepts, *id.* at 1086, and the "probability" of a jury's confusion. *Id.* Thus, the Third Circuit's opinion, while setting a high standard and requiring a clear showing of jury inability, does not definitely require a showing of jury inability to an absolute certainty; rather, high likelihood or probability suffices. The district court in the instant case, by finding that it would be "most difficult, if not impossible," for a jury to arrive at a rational verdict, met the Third Circuit's standard in terms of high likelihood or probability.

The Third Circuit expressed no intention to

depart from past jurisprudence touching the issue of complexity. Past jurisprudence striking jury demands or permitting a party to proceed in equity rather than law to avoid trial to a jury, has utilized standards similar, if not identical, to the standard which the district court used in the instant case. *Kirby v. Lakeshore & M.S.R. Co.*, used the same words as the district court in the instant case: "difficult, if not impossible". 120 U.S. at 134. *Ross v. Bernhard*, 396 U.S. 531 (1970), looked to the "practical abilities and limitations of juries". *Id.* at 538n.10. *Hyde Properties v. McCoy*, 507 F.2d 301(6th Cir. 1974), found that the jury was not "especially well-qualified" to dispose of the issues there involved and found that the facts would "likely" confuse the jury. *Id.* at 306. The Fifth Circuit in *H. B. Zachry Co. v. Terry*, permitted plaintiffs' accounting to proceed in equity on the grounds that it "would have been extremely difficult and perhaps impossible" for the jury to unravel the transactions between the parties. 195 F.2d at 189. Clearly, the district court relied upon jurispurdence decided before *In Re Japanese Electronic Products Antitrust Litigation* in formulating its standard. The district court's formulation of the standard clearly met the requirements of that prior jurisprudence. Equally clearly, the Fifth Circuit's decision conflicts with decisions of the Third and Sixth Circuits, as well as those of this

Court. *Rule* 17.1(a) and (c), *Rules of the United States Supreme Court.*

For the foregoing reasons, petitioners respectfully suggest that the Fifth Circuit erred when it ruled that the district court's "most difficult, if not impossible" standard failed to conform to the requirements of *In Re Japanese Electronic Products Antitrust Litigation.* Accordingly, petitioners pray this Court to grant certiorari and to reverse summarily the Fifth Circuit's holding that the district court failed to apply the proper standard of complexity.

C. The Fifth Circuit erred by refusing to retain jurisdiction over this appeal and remanding the matter to the district court for clarification of that court's finding of complexity.

While remand to district court follows as a matter of course on disposition of the interlocutory appeal the Fifth Circuit's Opinion of July 17, 1980, is law of the case and clearly holds that plaintiffs are entitled to a jury trial and permits no further proceedings directed to that issue.

28 U.S.C. §2106 provides that any court of appellate jurisdiction,

> . . . may affirm, modify, vacate, set aside or reverse any judgment decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Clearly the district court believed that it was applying the proper standard, when it ruled that the instant case is "most difficult, if not impossible" for a jury to decide rationally because of the factual, legal and technical complexity of the case. Clearly, the district court might well render a different finding of fact in light of the Fifth Circuit's Opinion of July 17, 1981, articulating its view of the proper standard under *In Re Japanese Electronic Products Antitrust Litigation.*

Under these circumstances, this Court, under 28 U.S.C. §2106 has the power to retain jurisdiction over the appeal, while reversing the Fifth Circuit to the extent of ordering that court to remand the matter to the district court for the limited purpose of clarifying, restating, or adding to its findings of fact and conclusions of law of October 7, 1980. *See Pure Oil Co. v. Superior Oil & Tire Co.*, 317 F.2d 330, 333 (6th Cir. 1963). Indeed, courts of appeals have remanded matters to district courts for further proceedings regard-

ing matters brought up on appeal on determining that the district court's findings of fact and conclusions of law are inadequate, *Lee v. Pickens County School System*, 563 F.2d 143, 144 (5th Cir. 1977); require clarification, *Berko v. Securities & Exchange Commission*, 297 F.2d 116, 118 (2nd Cir. 1961), reveal inconsistencies, *Farber v. Servan land Co., Inc.*, 541 F.2d 1086, 1088 (5th Cir. 1976); or reveal application of an incorrect legal standard where great confusion existed as to the proper legal standard. *Lee v. Pickens County School System*, 563 F.2d at 146-47, n.4; *Augusta Power Co. v. United States*, 278 F.2d F.2d 1,5 (5th Cir. 1960).

Judge Wicker's opinion of October 7, 1980, reveals, at most, an inconsistency between her application of the "most difficult, if not impossible" standard while citing *In Re Japanese Electronic Products Antitrust Litigation* for precedent. Further, the jurisprudence decided before *In Re Japanese Electronic Products Antitrust Litigation*, including Supreme Court jurisprudence (referred to in part B of these reasons), clearly reveals differences as to the proper standard applicable to striking jury demands on the grounds that a given case is so complex as to be beyond the practical limitations and abilities of a jury to render a rational verdict. Finally, it is equally clear that the distict court intended to ground its opinion

upon the standards articulated *In Re Japanese Electronic Products Antitrust Litigation* and the district court's utilization of the "most difficult, if not impossible" standard represents an attempt to meet the requirements of *In Re Japanese Electronic Products Antitrust Litigation.*

Accordingly, petitioners pray this Court to grant certiorari and to reverse summarily the Fifth Circuit to the extent that the Fifth Circuit did not retain jurisdiction over this matter, while remanding the matter for further proceedings limited to reformulation of the district court's fact findings articulated in its October 7, 1980 reasons for granting defendants' motion to strike plaintiffs' jury demand in light of the Fifth Circuit's opinion of July 17, 1981.

CONCLUSION

The petitioners, Witco Chemical Corporation, Dr. A. J. Buselli, Gerald Katz, Dr. C. Robert Lindegren, and John Sims, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit of July 17, 1981.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing have been served on the following attorneys of record by placing same in the United States mail, postage prepaid, this 19th day of November, 1981:

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APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROGER COTTON, ET AL. NUMBER 80-3750

VS.

WITCO CHEMICAL CORP. ET AL.

On August 14, 1980, this Court granted Motions of Defendants to strike the jury.

In accordance with the September 11, 1980 order of the Fifth Circuit Court of Appeals, a brief statement of the Court's reasons for granting said Motion follows:

This case was filed on December 21, 1976. It involves nine plaintiffs, one intervenor and five defendants. Plaintiffs, alleging claims arising under state law, the Sherman Antitrust Act and the Robinson-Patman Act, seek damages as well as injunctive relief.

Since the filing of this suit, defendant Witco has been purchased by Shell Oil Company. Although Shell is not a party, it has been a participant in the

discovery process and some of the individual defendants, former Witco employees, are now employed by Shell.

Since the inception of this case, the court record, at last count, has expanded to twenty volumes. Discovery has resulted in the production of hundreds of thousands of documents which counsel intend to introduce at trial. Additionally, counsel have led this Court to believe that there will be a voluminous number of trial witnesses whose testimony will relate to highly technical and complicated issues.

The complaint contains at least fourteen different causes of action, some of which overlap, others of which involve only some but not all of the parties. A jury would have to determine numerous complicated issues, some of which involve fraudulent misrepresentations, the wrongful appropriation of trade secrets, the development, marketing, manufacture and production of polybutylene resins, complicated financal accountings and conspiracies, among defendants in concert with others not a party to this suit, to monopolize and restrain trade.

During the past four years, original counsel for plaintiffs and counsel for defendants have expressed

their personal animosity toward each other by attempting to obscure the issues, delay discovery and in general impede the orderly administration of justice. At one time, original counsel for plaintiffs estimated that trial might take a considerable length of time. Although lead counsel for plaintiffs (who has only recently taken an active part in this case) estimates that trial will only last three to four weeks and lead counsel for defendants anticipates a trial period of approximately two months, the Court is of the opinion that trial will consume a much longer period of time.

Both plaintiffs and defendants have a right to have their case tried fairly. If this case takes months to try, practical problems arise in finding a jury, composed of a cross section of the community, who will be able to devote their attention to the evidence and not be concerned with family or business problems.

However, aside from the practical problems which might arise in this context, all parties are entitled to a verdict based upon the evidence and the applicable law. This Court is of the opinion that in this case, it would be most difficult, if not impossible, for a jury to reach a rational decision.

Not only would a jury have to comprehend the evidence to be presented and the legal standards in-

volved, but it would have to distinguish between the evidence, the law and the parties. It would have to apply some of the evidence to some of the parties and not all of the law to all of the evidence.

Based upon the above and foregoing, this Court is of the opinion that due process would best be served if this case were tried to a Court sitting without a jury. See *In Re Japanese Electronic Products*, 49 U.S. Law Week 2051, 1980-2 Trade Cases 63, 421 (3rd Cir. 1980; Scott Slonium, *Billion Dollar Verdict Raises Jury Question*, 66 ABA 953 (1980); contra., *In Re U.S. Financial Securities Antitrust Litigation*, 609 F.2d 411 (9th Cir. 1980).

New Orleans, Louisiana, this 7th day of October, 1980.

/S/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

APPENDIX B

Roger COTTEN, et al.
Plaintiffs-Appellants,

v.

WITCO CHEMICAL CORPORATION, et al.,
Defendants-Appellees.

No. 80-3750.

United States Court of Appeals,
Fifth Circuit
Unit A

July 17, 1981.

Individual and eight corporations controlled and operated by him brought suit against defendant corporation and four of its officers alleging that defendants had violated Sherman Act and Robinson-Patman Act, and that they had engaged in a variety of other tortious conduct. The United States District Court for the Eastern District of Louisiana, at New Orleans, Veronica D. Wicker, J., granted defendants' motion to strike plaintiffs' jury demand due to complexity of the case, and plaintiffs were granted leave

to bring interlocutory appeal. The Court of Appeals, Gee, Circuit Judge, held that: (1) trial court's findings that complexity of action was such as to make it "most difficult" for jury to reach rational decision was insufficient basis to support order granting defendants' motion to strike plaintiffs' jury demand, and (2) plaintiffs did not waive their right to trial by jury by their pretrial conduct in unnecessarily complicating case.

Reversed and Remanded.

Tate, Circuit Judge, concurred specially and filed opinion.

1. Federal Civil Procedure ⇐ 2031

If there is any such thing as complexity exception to Seventh Amendment, it cannot be applied where it would merely be "most difficult, if not impossible, for a jury to reach a rational decision;" rather, for such exception to apply, complexity of suit must be so great that it renders suit beyond ability of jury to decide by rational means with reasonable understanding of evidence and applicable legal rules. U.S.C.A. Const. Amend. 7.

2. Federal Civil Procedure ⇐ 2061

Trial court's finding that complexity of action alleging that defendants had violated Sherman Act and Robinson-Patman Act and had engaged in variety of other tortious conduct was such as to make it "most difficult" for jury to reach rational decision was insuffcient basis to support order granting defendants' motion to strike plaintiffs' jury demand. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 2 as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13; 28 U.S.C.A. § 1292(b); U.S.C.A. Const. Amend. 7.

3. Federal Civil Procedure ⇐ 2040

In action in which plaintiffs alleged that defendants had violated Sherman Act and Robinson-Patman Act and had engaged in variety of other tortious conduct, plaintiffs did not, as contended by defendants, waive their right to trial by jury by their pretrial conduct in unnecessarily complicating case. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 2 as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13; 28 U.S.C.A. § 1292(b); U.S.C.A. Const. Amend. 7.

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John V. Baus, Roy C. Cheatwood, Robert B. Bieck, Jr., David G. Radlauer, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, TATE and WILLIAMS, Circuit Judges.

GEE, Circuit Judge:

Roger Cotten and eight corporations controlled and operated by him filed suit against Witco Chemical Corporation ("Witco") and four of its officers in late 1976. In the spring of 1978, the petition of Mid-South Packaging Company ("Mid-South") to intervene was granted. Plaintiffs and Mid-South alleged that defendants had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, and that they had engaged in a variety of other tortious conduct. Following a lengthy pretrial period of extensive discovery proceedings, defendants filed a motion to

strike plaintiffs' jury demand due to the complexity of the case. The trial court granted the motion, and plaintiffs have brought this interlocutory appeal, which has been properly certified under 28 U.S.C. § 1292(b). While expressing no opinion on the issue of whether a complexity exception to the Seventh Amendment right to a jury trial exists,[1] we reverse and remand.

The trial court granted the defendants' motion to strike plaintiffs' jury demand in an oral order announced during oral argument on a different motion. The district court's explanation was as follows:

> I know what the Seventh Amendment says. By the very same token, I think this case is not really all that complicated. However, counsel have made it extremely complicated. There is no way that I feel that a jury could possibly understand this case because of counsel. . .
>
> . . .
>
> I just think that the case, the manner, the way

1. *Compare In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (recognizing a complexity exception), *with In re U.S. Finaancial Securities Litigation*. 609 F.2d 411 (9th Cir. 1979), *cert. denied, Gant v. Union Bank*, 446 U. S. 929, 100 S.Ct. 1866, 64 L.Ed.2d 281 (1980) (refusing to recognize a complexity exception).

> it has been presented by counsel for the last four years has been so complicated that the jury could not understand it. And as Mr. Baus [counsel for defendants] pointed out, there are numerous defendants in this case. There is no way that a jury can decide which particular allegation against which defendant . . . . [T]he issues in this case, gentlemen, have not been narrowed. Instead, what has occurred over the past four years is they have been extremely confusing to all parties, as well as the Court.

Were this the only explanation for the trial court's order, our decision to reverse would have been simple and straightforward: a plaintiff cannot be deprived of his right to a jury trial where the case is "not really all that complicated" but unnecessarily is made so by counsel. In such a case, the district court should use the pretrial conference to narrow the issues to those reasonably presented by each party's version of the facts. Further, through motions for summary judgment, unsupported allegations can be disposed of prior to trial.

Our task in this case is made somewhat more complex, however, because in our order granting leave to plaintiffs to bring this interlocutory appeal, we invited the district court to file "detailed, specific find-

ings of fact and conclusions of law with respect to the denial of a jury trial"; the district court has responded with a two and one-half page explanation that does not reiterate its earlier observation that this is an uncomplicated case made too complex for the jury by counsel. Instead, the written statement explaining the trial court's order refers to the amount of documentary evidence expected to be introduced at trial; the number of witnesses the parties intend to call whose testimony will relate to technical and complicated issues; the fact that the complaint contains fourteen different causes of action raising difficult and diverse issues; the anticipated length of the trial; and the difficulty a jury would have keeping the evidence with respect to each defendant and each cause of action separate. The written statement concludes that "it would be most difficult, if not impossible, for a jury to reach a rational decision . . . . [T]his Court is of the opinion that due process would best be served if this case were tried to a Court sitting without a jury."

[1] Even these findings and conclusions cannot, however, support the trial court's order If there is such a thing as a complexity exception to the Seventh Amendment, it cannot be applied where it would merely be "most difficult, if not impossible, for a jury to reach a rational decision." Rather, as stated

by the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d 1069, 1088 (3d Cir. 1980), for such an exception to apply "[t]he complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules." The "most difficult" standard applied by the district court in this case approaches that rejected by the Third Circuit when it stated that "[i]t is not enough that trial to the court would be preferable." *Id.* While we express no opinion as to whether a party's Seventh Amendment right to a jury trial ever can be abrogated by the complexity of the case, we are confident that if such an exception exists, it is only to be applied when the trial judge finds that the case is so complex that a jury *could not* render a rational decision based upon a reasonable understanding of the evidence and applicable rules of law. Any lesser standard invites dilution of the constitutionally guaranteed right to a jury trial.

[2, 3] thus, the trial court's order must be reversed on the basis of its finding that the complexity of this case is such as to make it "most difficult" for a jury to reach a rational decision. Defendants' contention that plaintiffs have waived their right to trial by jury by their pretrial conduct in unnecessarily

complicating the case is meritless. We find no indication that the trial judge's statements with respect to counsel's conduct refers only to plaintiff's counsel. More important, there is no contention that plaintiffs failed to demand a jury trial in a timely fashion, and defendants have cited no authority for finding a waiver of the jury trial based on other pretrial conduct of a party or his counsel.

REVERSED and REMANDED.

TATE, Circuit Judge, concurring specially:

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in civil actions not derived from equity. The Supreme Court of the United States has held that this constitutional guarantee of a jury trial is applicable to antitrust damage suits, whether or not equitable (non-jury) causes of action are joined with the legal (jury) cause. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 988 (1959); *Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 36 S.Ct. 948, 3 L.Ed. 505 (1916).* With the exception of *In Re Japanese Electronic Products Antitrust Litigation,* 631 F.2d1069 (3d Cir. 1980) (which recognized a due process "complexity" exception), the decisions have been virtually unanimous in holding that the Seventh

Amendment and the Supreme Court decisions interpreting it mean what they say: the Constitution grants the parties a right of jury trial in antitrust actions such as the present, no matter what the inconveniences in administration or the complexities of the case. See Fontham, "Developments in the Law—Antitrust Law," 41 La.L.Rev. 314, 417-28 (1981).

Sound reasons of administrative inconvenience do indeed often contra-indicate a jury trial as a preferable mode of decision in a complex antitrust suit. Perhaps, also, jurors may not competently understand the evidence and issues so as intelligently to decide them; although this plaint has also been made by sophisticated specialists in other areas of litigation less complex than the antitrust field. Likewise, it is undoubtdly true that enforcement of the Bill of Rights, including its guarantee of jury trial, may sometimes produce inconvenient or even unwise results in a particular case, when a broad constitutional right designed to protect individuals *in general* must be applied without discrimination as to the parties or the case.

Nevertheless, with all the practical arguments commending judicial abrogation of the constitutional right to jury trial in complex antitrust suits, I personally do not believe that an uncharted judicial ex-

ception of complexity should be imported so as to cast into doubt the clear right to jury trial previously recognized. Nor do I believe that we should, in here reversing a conscientious trial colleague, do so because of the alleged misapplication of a "complexity" exception, although nevertheless questioning whether such uncharted exception exists. Our opinion is, however, open to the intimation that the complexity exception *does* exist, and in my belief it thus tends to create uncertainty in the circuit law on an issue where until now there was certainty.

Therefore, while I concur in the reversal, I think the ground should instead be based upon a square holding that the constitutional right of jury trial in antitrust damage suits (until now recognized by our high court) prevents any judicial abrogation of this right on the grounds of complexity or inconvenience. By here evading this square holding, we open up further complexities of antitrust litigation that may require years to resolve, as our trial colleagues attempt, as did the present dedicated district judge, to chart the limits and plumb the possibilites of a curtailment of a jury trial in complex antitrust suits. Short of an interpretation to the contrary by our high court, therefore, we should not cast doubt upon the Seventh Amendment right of jury trial in antitrust damage actions. We should, instead, adhere to the jurisprudential in-

terpretation clearly applicable and to enforcing the unambiguous Seventh Amendment provision that does not permit of judicially created exceptions to the right of jury trial when required by our Constitution.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 80-3750

Filed: Sept. 15, 1981
Received: Sept. 16, 1981

ROGER COTTEN, ET AL.,
Plaintiffs-Appellants,

versus

WITCO CHEMICAL CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(September 15, 1981)

Before GEE, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Thomas Gibbs, Jr.
UNITED STATES CIRCUIT JUDGE

Opposition

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS

No. 81-968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WITCO CHEMICAL CORPORATION, *et al.*,

Petitioners,

v.

ROGER C. COTTEN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

Was the Court of Appeals correct in holding that the facts of this case make it unnecessary to reach the constitutional issue of whether complexity can ever be grounds for abrogating the Seventh Amendment right to trial by jury?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-968

WITCO CHEMICAL CORPORATION, *et al.*,

Petitioners,

v.

ROGER C. COTTEN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

The respondents[1] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petition Raises No Constitutional Issue.

The petition does not present the issue of whether the Seventh Amendment right to trial by jury can ever by denied solely because of the complexity of the case. That question is only "peripherally" involved, as the petition points out at page 9, footnote 2.

---

[1] All parties to the proceeding are accurately listed pursuant to rule 28.1 at pages iii and iv of the petition. That list includes all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent corporation on whose behalf this opposition is filed.

The Fifth Circuit expressed no opinion as to whether there can ever be a complexity exception to the Seventh Amendment, but concluded that if there is such an exception, "it is only to be applied when the trial judge finds that the case is so complex that a jury *could not* render a rational decision based upon a reasonable understanding of the evidence and applicable rules of law." Appendix B to the petition, page A-12. The district court was reversed because it made no such finding.

The petition raises purely factual issues based upon the particular facts of this case. The questions this Court is asked to review would have no significance for any other case.

2. The Petition Seeks Interlocutory Review Of Factual Issues That Are Changing And Will Continue To Change.

The first of the Questions Presented by the petition asks this Court to determine whether the district court could have made findings that would raise the complexity exception. The petition asks this Court to make a factual determination requiring a review of the entire record and all proceedings outside the record that affect the complexity of the issues to be tried.

Since the jury demand was struck on July 23, 1980, the district court has begun pre-trial conferences to clarify and narrow issues and has ordered counsel to marshal trial exhibits, exchange written contentions, eliminate uncontested issues and take the intitial steps leading to preparation of a pre-trial order. Any determination of the complexity of the issues to be tried in this case would have to consider the effect of all proceedings since the district court decision denying a jury as well as the effect of pre-trial and trial procedures yet to come.

Interlocutory review by this Court of the changing factual issues in this case would be particularly inappropriate.

3. The Fifth Circuit Did Not Fail To Follow Any Relevant Decision Of This Court.

In the first of the Reasons for Granting Writ, the petition argues that the Fifth Circuit failed to follow the decision of this Court in *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U.S. 130 (1887). That case did not determine any question raised on this appeal. *Kirby* was a pre-merger suit in equity involving no Seventh Amendment issue. *Kirby* has no relevance here because this is an action at law for damages. [2]

The petition also argues that complex issues can convert an action at law into a suit in equity, but that argument has been rejected by both courts of appeals that have considered the question. *See In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1080-83 (3d Cir. 1980); *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 423-24 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

4. The Decision Of The District Court Does Not Meet Any Recognized Standard For Striking A Jury Demand.

The district court gave two statements of its reasons for striking the jury demand. During argument the district court stated orally that "[t]here is no way that I feel that a jury could possibly understand this case because of counsel." Appendix B to the petition, page A-9. In later written reasons the district court concluded that "it would be most difficult, if not impossible, for a jury to reach a rational decision." Appendix A to the petition, page A-3. Neither of these statements of reasons considers the possibility of reducing complexity by appropriate pre-trial and trial procedures.

---

[2] The petition does not and could not contend that the request for injunctive relief made in the complaint affects plaintiffs' right to trial by jury of their damage claims.

The only court of appeals decision to acknowledge the possibility of a complexity exception to the Seventh Amendment, *In re Japanese Electronics Products Antitrust Litigation, supra,* gave this summary of the test to be used in applying such an exception:

> In suits at law, a court should deny jury trial on due process grounds only in exceptional cases when the court, after careful inquiry into the factors contributing to complexity, determines that a jury would be unable to understand the case and decide it rationally. Before any such denial, due consideration should be given to the particular strengths of the jury in deciding complex cases, to the possible use of special trial techniques to increase a jury's capabilities, and to methods of reducing the suit's complexity.

631 F.2d at 1089. The Fifth Circuit correctly found that even if the Third Circuit standard were applicable — an issue on which it expressed no opinion — that standard would not justify denying a jury trial in this case.

Neither of the statements of reasons given by the district court finds, or would justify a finding, that a rational jury verdict is impossible. Neither statement gives an adequate reason, even under the standard enunciated by the Third Circuit, for denying a jury trial to parties who have made a timely demand.

5. This Case Should Not Be Remanded To The District Court For A Third Statement Of Reasons For Striking The Jury Demand.

The last of the Reasons for Granting Writ stated in the petition would have this Court direct the Fifth Circuit to remand to the district court for "clarification" of the order striking the jury demand. But the Fifth Circuit has done precisely that.

In its initial order striking the jury demand announced during oral argument on July 23, 1980, the district court gave an oral statement of reasons for its action that is quoted in the opinion of

the Fifth Circuit. *See* Appendix B to the petition, pages A-9 and A-10. A subsequent order of the Fifth Circuit dated September 11, 1980, permitted the interlocutory appeal, expedited the appeal and invited the district court to file, "if it so desires, detailed specific findings of fact and conclusions of law with respect to the denial of a jury trial." The district court's findings and conclusions in response to that invitation were filed October 7, 1980, *see* Appendix A to the petition, and are discussed in the Fifth Circuit opinion, *see* Appendix B to the petition, page A-11.

The Fifth Circuit has already asked for, received and considered the district court's clarification of its reasons for striking the jury demand. The petition suggests no purpose to be served by having yet another statement of those reasons.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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